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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.,
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

REPLY OF APPELLEE THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL

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Not until the last two and a half pages of their opposition to the motions to dismiss do appellants get down to

the specific grounds on which our motion is based. We, therefore, start at that point, returning later to the legal irrelevancies and factual misstatements contradictory of findings below with which the earlier part of appellants' opposition is filled.[1]

This appeal is not authorized by the statute (28 U.S.C. 1257(2)) because it does not draw into question the validity of a state statute, but rather the validity of a *nonlegislative order* of the California Public Utilities Commission (Tel.Br. 14). This point is supported by authorities already cited (Tel.Br. 14). Appellants, however, say that it rests on "an empty technicality which is superseded by the practical logic of more recent decisions" (Opp. 12). Since the "more recent decisions" are not cited, further comment appears unnecessary.

Appellants go on to say that the decision below, by sustaining action of the California Commission, draws into question "the validity of California's enabling constitutional and code provisions" (Opp. 12). What "constitutional and code provisions" are invalid, and why, are matters left unspecified.

In *Wilson v. Cook* (1946) 327 U.S. 474, this Court said (p. 482):

> "In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court

[1] Appellants' opposition will herein be abbreviated as Opp. We abbreviate into Tel.Br. the "Motion of Appellee The Pacific Telephone and Telegraph Company to Dismiss Appeal and Brief in Support Thereof." References herein to the opinions of the California Supreme Court and Public Utilities Commission will be given as in our former brief.

> or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or 'the right to collect the tax' which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn. v. Alderson, supra,* 185 and cases cited. For 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of an appeal. *Jett Bros. Co. v. City of Carrollton,* 252 U.S. 1, 6."

See also many other citations in *Wilson v. Cook* supra (327 U.S. 482); also *Hanson v. Denckla* (1958) 357 U.S. 235, 245.

Appellants next argue that if an appeal will not lie, the statute (28 U.S.C. 2103) nevertheless provides "for certiorari consideration of the substantial federal issues tendered by the appellants" (Opp. 13). As against this contention, and as pointed out in our former brief (pp. 16-17), the order below regulates only the appellee Telephone Company. It applies to nobody else. It neither directs nor prohibits any action by appellants. In such circumstances neither appeal nor certiorari is available to appellants (see authorities in our former brief, pp. 16-17). No case known to us holds or suggests that an unregulated person has standing here to contest an order regulating some other person as a public utility. The two cases cited by appellants in support of their alleged interest (Opp. 14) involved facts not comparable with the case at bar.

Since appellants have no standing to appeal because they do not draw into question the validity of a state statute, and have no standing either on appeal or certiorari because the order appealed from does not apply to

them, it follows, we submit, without more that the motion to dismiss should be granted. We nevertheless refer to appellants' alleged federal questions, again submitting that none of them have any substance.

The supposed right which appellants here seek to protect is the right to be free of Telephone Company competition. This is evident on the record; it was noted below—"On the grounds of preserving competition, they seek to bar a competitor from the field" (Cal.Comm. 20)—and it is expressly avowed by appellants in aid of their supposed interest to maintain this appeal (see, for example, Opp. 13). But freedom from competition is not a right protected by the Fourteenth Amendment (*Tennessee Power Co. v. T.V.A.* (1939) 306 U.S. 118, 138-140), and appellants' claim thereto presents no substantial federal question (*Peerless Stages, Inc. v. Railroad Commission of California* (1935) 296 U.S. 540).

We point out further that while appellants refer to "Substantial Constitutional Problems" (Opp. 9), they do not mention the Fourteenth Amendment in their opposition to the motion to dismiss; hence, presumably, their claims based on the amendment have been abandoned. The point made by the jurisdictional statement was that the Fourteenth Amendment prohibits the state from regulating the type of intrastate radiotelephone communication service involved in this case. There is no substance to this contention as shown in our former brief (Tel.Br. 18-19).

As to the Federal Communications Act, the case at bar involves an intrastate tariff. The statute expressly recog-

nizes state jurisdiction of "intrastate communication service by wire or radio of any carrier" (see Federal Communications Act, sec. 2(b) and Tel.Br. 19-20). Consequently, the approval of an intrastate tariff as being justified by state law certainly does not violate any policy of the federal statute.

As to appellants' arguments under the consent decree of the United States District Court of New Jersey, we wish to add little to things said in our former brief (Tel.Br. 9-12, 20-22). It is, we submit, altogether inappropriate to ask this Court to construe or interpret the New Jersey decree in the present case. The New Jersey record is not here. If, as reasonably suggested by the Federal Communications Commission, the decree is to be construed in the light of some *intent* not evident from the language of the decree, such construction should appropriately be made in the first instance by the New Jersey District Court (see quotation from F.C.C., Tel.Br. 12).

Appellants' opposition is completely reckless in asserting matters not brought up below. For example, appellants now attack the Telephone Company rates contained in the California order (Opp. 9-10)—this without offering a particle of evidentiary support, and notwithstanding the express statement of the California Commission that the case was fought primarily on jurisdictional grounds "and the interested parties had virtually nothing to offer as to the adequacy of the proposed rates" which the Commission sustained as reasonable (Cal.Comm. 30). Appellants did not challenge the reasonableness of the rates in the Supreme Court of California (see Cal.Sup.Ct. 2). As a matter of fact they did not raise the point even in their

notice of appeal to this Court and bring it up for the first time in their opposition to the motions to dismiss.

As another instance, appellants charge that the arrangements between the Telephone Company and its customers involve unlawful tying arrangements (Opp. 8)—another point never suggested below. The point is unsubstantial on its face; it may, however, be added that appellants are in effect charging themselves with illegality, since their own jurisdictional statement says (p. 18) that the pattern of appellants' arrangement with customers in the field here involved is "identical" with that of the Telephone Company.

Appellants' opposition, like their jurisdictional statement, proceeds in absolute disregard of the findings below. Pertinent findings, summarized in our former brief, are explicit to the effect that this case involves no monopoly, no tendency to monopoly, no unfair competition by the Telephone Company, no threat to the continuance of competitors (including appellants) who hold more than 95 per cent of the California business, and—as is obvious—that regulation is a competitive handicap, not an advantage (see record quotations and references Tel.Br. 8-9, 17-18).

Appellants, without evidentiary support or reference, assert the contrary of all these findings.

Appellants again charge, with even more lurid adjectives and metaphors than those contained in their jurisdictional statement, that the California Supreme Court has authorized the Telephone Company to violate the antitrust laws, to violate the New Jersey consent decree, to circumvent the jurisdiction of the Federal Communications Commission, etc., etc. (see, for example, Opp. 4, 5,

6, 7, 8, 11). The California Court did nothing of the kind. It affirmed the acceptance by a regulatory commission of an intrastate public utility tariff as being proper under California law. If the Telephone Company should in any action under this tariff infringe any federal law, order or decree—which it has not done—all usual remedies are available. The decision below cuts off none of them. It is absurd, irresponsible, and completely lacking in the respect due the Supreme Court of California to charge that court with trying to circumvent federal authority in the interest of private wrongdoing.

In our former brief it was pointed out (Tel.Br. 13) that the Telephone Company had recently filed with the California Commission an application for authority to cancel its Tariff Schedule No. 108-T, and to withdraw from the furnishing of private mobile communications service on a lease-maintenance basis by January 24, 1961, except as to service which may be provided to the United States Government. The Commission has taken no action on this application, but has set it for hearing on April 27, 1959.

We respectfully submit that the appeal should be dismissed and certiorari should be denied.

Dated, April 20, 1959.

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